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THE MYSTERIOUS, THE COMPLEX, AND THE PHENOMENAL: FACTORS AFFECTING THE ADMISSIBILITY OF EXPERT PSYCHOLOGICAL TESTIMONY IN GEORGIA

INTRODUCTION

The standards in criminal cases for admissibility of expert testimony concerning novel psychological theories are continuing to develop in Georgia. At present, two lines of cases exist. One line follows *Smith v. State*,¹ a 1981 case in which the court admitted expert testimony on battered woman syndrome.² Although *Smith* has been offered as precedent for the introduction of expert testi-

1. 247 Ga. 612, 277 S.E.2d 678 (1981).

2. Characteristics of the victim of battered woman syndrome include low self-esteem, belief in myths about battering relationships, traditional views about the home, "accept[ance of] responsibility for the batterer's actions," guilt along with denial of fear and anger, passivity, severe stress reactions, use of sex to establish intimacy, and belief that she must resolve her problem without help. L. WALKER, *THE BATTERED WOMAN* 31 (1979).

In her later book, *The Battered Woman Syndrome*, Dr. Walker reported the results of a study of 400 battered women and verified her earlier theories, particularly that battered women characteristically exhibit "learned helplessness" and that a battering relationship follows a three-phase cycle. L. WALKER, *THE BATTERED WOMAN SYNDROME* 2 (1984).

Through the theory of learned helplessness, Dr. Walker hypothesized a depressive, passive reaction to violence adopted as a psychological survival skill in the face of what the woman perceived as her powerlessness in relation to her abusive partner. *Id.* at 86-87. The theory explains why a battered woman does not leave her partner, even though, from a reasonable person's point of view it is difficult to see why she would stay. "This concept is important for understanding why battered women do not attempt to free themselves from a battering relationship. Once the women are operating from a belief of helplessness, the perception becomes reality" L. WALKER, *THE BATTERED WOMAN* 47 (1979).

There also are stages typical of a battering relationship: "tension building," "acute battering incident," and "loving contrition." L. WALKER, *THE BATTERED WOMAN SYNDROME* 95 (1984). The violence in a typical battering relationship is not constant, though it is recurrent. Furthermore, the third stage of "loving contrition," following a violent incident, when the batterer apologizes and "show[s] kindness and remorse" may convince the woman that it is worthwhile to stay in the relationship. *Id.* at 96.

mony on many topics in civil³ as well as criminal cases,⁴ it has been cited primarily in cases involving battering parent syndrome⁵ and child sexual abuse syndrome.⁶ Additionally, courts have cited *Smith* with approval in cases expanding the role of expert psychological testimony.⁷ As a result, *Smith* may eventually provide support for admission of expert testimony about rape trauma syndrome,⁸ an issue not yet presented to Georgia appellate courts.

In contrast, another line of Georgia cases follows *Jones v. State*,⁹

3. See, e.g., *Clanton v. Von Haam*, 177 Ga. App. 694, 695, 340 S.E.2d 627, 629 (1986) (whether doctor-patient relationship was established is a question for jury rather than the expert); *News Publishing Co. v. DeBerry*, 171 Ga. App. 787, 789, 321 S.E.2d 112, 115 (1984) (journalism professor permitted to testify as expert on standards of reporting); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 332, 319 S.E.2d 470, 474 (1984) (automotive product design beyond ken of jurors).

4. See, *Chapman v. State*, No. 45343, slip op. at 3 (Ga. Sup. Ct. May 4, 1988) (testimony on violent character of victim admissible after prima facie showing of battered woman syndrome defense); *Allison v. State*, 256 Ga. 851, 852, 353 S.E.2d 805, 807 (1987) (testimony on child sexual abuse syndrome impermissible), *rev'g* 179 Ga. App. 303, 346 S.E.2d 380 (1986); *State v. Butler*, 256 Ga. 448, 450, 349 S.E.2d 684, 685-86 (1986) (pediatrician's testimony on whether child had been sexually abused admissible), *rev'g* 178 Ga. App. 110, 342 S.E.2d 338 (1986); *Clenney v. State*, 256 Ga. 116, 118, 344 S.E.2d 216, 218 (1986) (limitation on scope of testimony on battered woman syndrome); *Sanders v. State*, 251 Ga. 70, 74-75, 303 S.E.2d 13, 17 (1983) (offer of expert testimony on battering parent syndrome improper character evidence); *Sinns v. State*, 248 Ga. 385, 387, 283 S.E.2d 479, 481 (1981) (expert testimony on whether confession was voluntary held inadmissible). Discussion of major criminal cases in which *Smith* has been offered as precedent comprises the majority of the material in this Note.

5. Battering parent syndrome is a "set of concurrent characteristics typically shared by parents prone to commit child abuse." Annotation, *Admissibility at Criminal Prosecution of Expert Testimony on Battering Parent Syndrome*, 43 A.L.R. 4th 1203, 1204 (1986). These characteristics include the parent's experience as a child in an abusive environment, the parent's chronic stress—often single parenthood, the parent's "history of poor social judgment," an unplanned and unwanted child, and chronic sickness or other difficulty with the child. *Sanders v. State*, 251 Ga. 70, 73-74, 303 S.E.2d 13, 16 (1983).

6. Child sexual abuse syndrome (also called child sexual abuse accommodation syndrome and the sexually abused child syndrome) is characterized by the child making inconsistent reports of abuse or recanting initial reports, by various neurasthenic symptoms without a physical basis, clinical depression, isolation from other children, and fear of men. Wells, *Expert Testimony: To Admit or Not To Admit*, 57 FLA. B. J. 673, 674 (1983) (characteristics emphasized in the Georgia courts).

7. See, e.g., *Butler*, 256 Ga. at 450, 349 S.E.2d at 685-86; *News Publishing Co.*, 171 Ga. App. at 789, 321 S.E.2d at 115.

8. Rape trauma syndrome is a post-traumatic stress disorder characterized by re-experience of the traumatic incident, sometimes through dreams or nightmares, and detachment from the external world. Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome*, 42 A.L.R. 4th 879, 883-84 (1985). See generally McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C.L. Rev. 1143 (1985).

9. 232 Ga. 762, 208 S.E.2d 850 (1974).

in which the court held that a psychologist's testimony was not proper on the issue of the unreliability of eyewitness identification. The rule of *Jones*, which is still good law in Georgia, continues to bar admissibility of expert testimony on subjects about which, according to the court's assessment, ordinary jurors are effectively able to draw unaided conclusions.¹⁰

Commentators generally discuss admissibility of expert testimony in terms of the propriety of the subject matter.¹¹ While this emphasis is important, it is not the only factor courts consider in determining whether expert testimony should be allowed. Georgia courts have expressed concern about procedural fairness when expert psychological testimony is offered,¹² concern about limiting the scope of expert testimony,¹³ and concern about opening the door too wide to such testimony and thus creating problems of judicial administration.¹⁴ In addition, there may be an implicit trend in Georgia courts to be more receptive to expert testimony in such areas as domestic violence and child abuse when traditional sociocultural myths and taboos may affect jurors' attitudes. Often there are links between these myths and taboos and traditional, but outmoded, legal standards, such as the historical legal disabilities of women and doctrines of family privacy. These outmoded standards have impeded courts in providing remedies to domestic violence victims.¹⁵

This Note describes the manner in which Georgia courts have extended and limited the precedent provided by *Smith* for the admissibility of expert psychological testimony. Specifically, it analyzes Georgia courts' interpretation in four areas: the use of expert testimony on the ultimate issue or ultimate fact; subject matter considered appropriate for expert testimony; possible implicit concerns of Georgia courts in the emotional areas of domestic violence and sexual abuse; and the reliability of psychological theories. The

10. See, e.g., *Mitchell v. State*, 176 Ga. App. 32, 32-33, 335 S.E.2d 150, 151 (1985) (eyewitness identification); *Davis v. State*, 158 Ga. App. 549, 553, 281 S.E.2d 305, 310 (1981) (eyewitness identification in a line-up).

11. See, e.g., Comment, *Expert Testimony and Battered Women: Conflict Among the Courts and a Proposal*, 3 J. LEGAL MED. 267 (1982); McCord, *supra* note 8.

12. *Sanders v. State*, 251 Ga. 70, 73, 303 S.E.2d 13, 16 (1983). See *infra* text accompanying notes 115-30.

13. *Clenney v. State*, 256 Ga. 116, 118-19, 344 S.E.2d 216, 218-19 (1986). See *infra* text accompanying notes 131-41.

14. *Jones*, 232 Ga. at 766, 208 S.E.2d at 853.

15. See Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1658-63 (1981).

Note also discusses the extension of existing precedent to include testimony on rape trauma syndrome and suggests that Georgia courts should reconsider their position barring expert testimony on the unreliability of eyewitness testimony.

I. *SMITH V. STATE*

The Georgia Supreme Court in *Smith v. State*¹⁶ held that the trial court erred by excluding expert testimony of a clinical psychologist on battered woman syndrome. The defense offered the testimony in a murder case, contending the female defendant killed her live-in lover out of fear. The statutory standard for self-defense in Georgia requires that the person "reasonably believe[] that such . . . force is necessary to defend himself or a third person against [another's] imminent use of unlawful force."¹⁷ The Code further provides that the use of deadly force is justified "only if [the defendant] reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person . . ."¹⁸ Consequently, proof of the sincerity and extent of the defendant's fear, which allegedly led her to believe that she was in imminent danger, was crucial to the defense.

In *Smith*, the defendant shot her boyfriend after a quarrel. She testified that the shooting occurred immediately after he threatened her with his fist, kicked her, choked her, and threw her against a door.¹⁹ The supreme court recognized that the pattern of the couple's relationship was important in establishing the relevance of the expert testimony on battered woman syndrome. Evidence showed the boyfriend had periodically beaten the defendant during their four-year relationship. This behavior was interspersed with phases when he was contrite and told her that he loved her. She stated that she did not seek help from the police or from her friends because she believed his apologies were sincere.²⁰ The court's opinion carefully detailed this foundational testimony, comparing it with the typical phases of battered woman syndrome.²¹

16. 247 Ga. 612, 277 S.E.2d 678 (1981).

17. O.C.G.A. § 16-3-21(a) (1982).

18. *Id.*

19. *Smith*, 247 Ga. at 612-13, 277 S.E.2d at 679.

20. *Id.* at 613, 277 S.E.2d at 679.

21. See *supra* note 2. The stages of the relationship described in *Smith* parallel the cyclic nature of the theoretical battering relationship described by Dr. Walker. This parallel supports the relevance of admitting testimony on battered woman syndrome.

The supreme court also described in detail the substance and extent of the testimony that was offered but held inadmissible at trial. The psychologist would have testified about the reasons why battered women fail to report abuse to police and friends, often stay in abusive relationships, exhibit low self-esteem, and believe their partners will not continue the battering. The testimony would have shown that battered women are increasingly afraid for themselves, thereby demonstrating that "the primary emotion of a battered woman is fear."²² The supreme court ruled that this testimony was relevant and that it would be helpful to ordinary jurors.

In contrast, when the court of appeals affirmed the *Smith* trial court's exclusion of the expert testimony, it reasoned that the testimony was not necessary or helpful because the jury was as capable as the expert of judging whether the defendant was motivated by fear.²³ Furthermore, the court of appeals held that expert opinion testimony was improper when offered on the ultimate issue to be decided by the jury.²⁴

In reversing the court of appeals' judgment, the Georgia Supreme Court focused on the question of admissibility of opinion testimony on the ultimate issue, stating:

We hold that the correct rule is as follows: Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman.²⁵

In addition to disposing of the ultimate issue question, the supreme court found that expert testimony on battered woman syndrome would help the average juror who could not fully understand the situation without the information and opinion provided by expert testimony.²⁶ Specifically, the supreme court ruled that the testimony would aid the jury in determining whether the woman acted in fear by offering a possible explanation as to why she had not left her partner, why she had not informed the police or friends, and how she feared escalating violence toward herself.²⁷

22. *Smith*, 247 Ga. at 613, 277 S.E.2d at 680.

23. 156 Ga. App. 419, 419-20, 274 S.E.2d 703, 704 (1980), *rev'd*, 247 Ga. 612, 277 S.E.2d 678 (1981).

24. *Id.* (quoting *Jones v. State*, 232 Ga. 762, 764, 208 S.E.2d 850, 853 (1974)).

25. *Smith*, 247 Ga. at 619, 277 S.E.2d at 683.

26. *Id.*

27. The areas in which the court found that expert testimony on battered woman

The question of the helpfulness of expert testimony concerning an ultimate issue was important to the supreme court's analysis. The court stated that the holding was in accord with Rule 704 of the Federal Rules of Evidence, which permits opinion testimony on the ultimate issue if the testimony will help the fact finder understand evidence or determine a disputed fact.²⁸ Stating this standard was the established rule in Georgia, the court discussed *Metropolitan Life Insurance Co. v. Saul*,²⁹ a 1939 case in which a physician stated his opinion about whether the plaintiff had been "permanently and totally disabled" and therefore would be eligible for relief from payment of premiums on a life insurance policy. This testimony was allowed even though the question of disability was an ultimate issue for the jury to decide.³⁰

Holding as a matter of law that opinion testimony was admissible on an issue that the jury was to decide, the court in *Metropolitan Life* next considered the propriety of expert opinion on the issue of disability.³¹ Relying on a broad statutory grant of authority to admit expert testimony, the court concluded that expert testimony was proper on topics that "are not known to the common

syndrome would be useful were specifically relevant to the two parts of the statutory standards for justifiable self-defense under O.C.G.A. § 16-3-21(a) (1984). *See supra* notes 12-18 and accompanying text.

The defendant's claim that she acted in fear—or, in the terms of the Code, with reasonable belief in "imminent use of unlawful force"—was buttressed by battered woman syndrome, which contends that women suffering from this syndrome stay involved in the violent relationship and do not seek outside help. Additionally, the contention that women suffering from this syndrome fear that the violence will escalate tended to justify the defendant's belief in the need to use deadly force to protect herself.

28. *Smith*, 247 Ga. at 619, 277 S.E.2d at 683. The text of the Federal Rule states, "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704.

29. *Smith*, 247 Ga. at 616, 277 S.E.2d at 681 (discussing *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939)).

30. The court in *Metropolitan Life* recognized the general rule that "witnesses must testify only as to facts and not as to their opinion deduced from facts, the latter being left as a proper function for the jury." The court, however, also recognized a statutory exception to the rule allowing testimony about the witness's opinion. *Metropolitan Life*, 189 Ga. at 4-5, 5 S.E.2d at 219.

The current Code section states:

Where the question under examination, and to be decided by the jury, shall be one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor. If the issue shall be as to the existence of a fact, the opinions of witnesses shall be generally inadmissible.

O.C.G.A. § 24-9-65 (1982).

31. *Metropolitan Life*, 189 Ga. at 5, 5 S.E.2d at 219.

or average man, but are among those things shrouded in the mystery of professional skill or knowledge"³²

Even though it relied on *Metropolitan Life*, the supreme court in *Smith* acknowledged that Georgia cases have not always followed the rule expressed in *Metropolitan Life*. The court specifically mentioned *Jones v. State*,³³ which the court of appeals had quoted to support its decision in *Smith* that the expert testimony on battered woman syndrome was inadmissible.³⁴ The supreme court, however, did not overrule *Jones*.³⁵

The supreme court in *Smith* found that battered woman syndrome was the kind of subject matter about which expert testimony could aid jurors. In support of this conclusion, the court cited cases from other jurisdictions, including *Ibn-Tamas v. United States*,³⁶ a leading case on admissibility of expert testimony on battered woman syndrome. The Georgia court's conclusion mirrored that of the court in *Ibn-Tamas*—that the expert witness "supplied an interpretation of the facts which differed from the ordinary lay perception advocated by the prosecution and hence satisfied the requirement that to be admissible the opinion of the expert must be one that laymen could not draw; i.e., it was 'beyond the ken of the average layman.'"³⁷ Thus, the expert provided a perspective that laypeople lacked, and without which the jurors would have been unable to reach reasonable conclusions about the situation.

On several occasions, Georgia appellate courts have attempted to clarify the scope of the holding in *Smith*. Two years after *Smith*,

32. *Id.* at 9, 5 S.E.2d at 221. The Code states: "The opinions of experts on any question of science, skill, trade, or like questions shall always be admissible" O.C.G.A. § 24-9-67 (1982).

33. *Smith*, 247 Ga. at 616, 277 S.E.2d at 681 (citing *Jones*, 232 Ga. at 762, 208 S.E.2d at 850).

34. 156 Ga. App. at 419, 274 S.E.2d at 704.

35. Professor Agnor has found the Georgia courts preoccupied with the "ultimate issue rule," which, he believes, should have been settled by *Metropolitan Life*. He discusses the lack of clarity which resulted from *Smith* since *Jones* was mentioned by the *Smith* court, but not overruled. He also expressed concern that it would be easier for courts to "parrot" the "ultimate issue rule" rather than closely consider the issue in the particular case. W. AGNOR, AGNOR'S GEORGIA EVIDENCE § 9-3 (1986).

Other commentators also have found some lack of clarity in *Smith*. For example, it is not clear to what extent the criteria of the Federal Rules of Evidence on expert and opinion testimony now govern in Georgia. Comment, *supra* note 11, at 285.

36. 407 A.2d 626 (D.C. 1979).

37. *Smith*, 247 Ga. at 619, 277 S.E.2d at 683 (quoting *Ibn-Tamas v. United States*, 407 A.2d at 634-35).

in *Sanders v. State*,³⁸ the supreme court stated that "under appropriate circumstances" a female defendant may introduce expert testimony to (1) describe battered woman syndrome, (2) apply the theory to the facts of the instant case, and (3) give the opinion that the defendant's case matched the profile.³⁹

Georgia courts also have commented on the holding of *Smith* in cases in which they concluded that expert testimony was not helpful or necessary to the jury. For example, in *Sinns v. State*,⁴⁰ a defendant in a murder case, who was appealing on the issue of the voluntariness of his confession, contended that the trial court erroneously excluded testimony by a clinical psychologist concerning the defendant's state of mind at the time of the confession.⁴¹ The court distinguished battered woman syndrome from the issues involved in determining the voluntariness of a confession and described the syndrome as "a unique and almost mysterious area of human response and behavior" and a "complex subject."⁴²

The supreme court, later explaining *Sinns*, stated: "We have been less willing to permit experts to testify to an individual's state of mind."⁴³ This kind of limitation seems to indicate that the court is more receptive to expert testimony describing the general characteristics of a syndrome. The court is more cautious when the expert expresses an opinion about the specific individuals and circumstances of the particular case. Thus, the expert may testify on the issue to be determined by the jury, but not the specific factual determination of the case.⁴⁴ In limiting the use of expert testimony, the court appeared to draw a fine distinction between fear, the generally characteristic state of mind experienced by battered women, and the specific state of mind of the criminal defendant in *Sinns*.

In *Butler v. State*,⁴⁵ a court of appeals' dissenting opinion ana-

38. 251 Ga. 70, 303 S.E.2d 13 (1983). See *infra* text accompanying notes 115-17.

39. *Sanders*, 251 Ga. at 74, 303 S.E.2d at 17. *Sanders*, a murder case in which the defendant was accused of killing her infant daughter, did not deal with battered woman syndrome. Instead, the prosecution sought to offer testimony by a clinical psychologist suggesting that the defendant fit the profile of "battering parent syndrome." *Id.* at 73, 303 S.E.2d at 16. In rejecting it as precedent for this particular use of expert testimony, the court discussed the meaning of *Smith*. *Id.* at 74, 303 S.E.2d at 17.

40. 248 Ga. 385, 283 S.E.2d 479 (1981). See *infra* text accompanying notes 179-85.

41. *Sinns*, 248 Ga. at 387, 283 S.E.2d at 481.

42. *Id.*

43. *Allison v. State*, 256 Ga. 851, 852, 353 S.E.2d 805, 807 (1987) (citing *Sinns*, 248 Ga. at 385, 283 S.E.2d at 479).

44. *Id.* at 853, 353 S.E.2d at 808.

45. 178 Ga. App. 110, 342 S.E.2d 338 (1986).

lyzed *Smith* and stated that, in deciding the admissibility of expert testimony, "the court should determine if (1) the issue is so complex as to be beyond the ordinary knowledge of lay persons; or (2) so phenomenal in nature as to lend itself to gross misconceptions without the benefit of expert testimony."⁴⁶ The first part of this analysis includes situations involving an obvious need for scientific or other specialized knowledge. The latter deals with subject matter in areas with which the layperson may be familiar, such as the domestic strife at issue in battered woman syndrome, but in which common knowledge and conventional thinking may not lead to conclusions in agreement with those supported by scientific study.

Although the Georgia Supreme Court has been receptive to the battered woman syndrome as a novel psychological theory, this acceptance has not signaled a broad extension of the *Smith* holding to other psychological theories. In fact, *Smith* has not even been extended to permit expert testimony offered on battered woman syndrome when there have been significant differences in factual⁴⁷ or procedural aspects of the case.⁴⁸ In addition, within a year after *Smith*, commentators on evidence in Georgia courts suggested that expert testimony on an ultimate issue appeared to be limited to cases concerned with battered woman syndrome, and that in other instances the courts had returned to the exclusion of opinion testimony on the ultimate issue, a rule rejected in the majority of jurisdictions.⁴⁹ The stance of Georgia courts, however, seems to be more

46. *Butler*, 178 Ga. App. at 114-15, 342 S.E.2d at 341-42 (Benham, J., dissenting). The admissibility of expert testimony was discussed in *Butler* when a pediatrician was called to testify on the issue whether a child had been sexually abused. The doctor testified on the basis of the child's statements during the examination, rather than exclusively from physical evidence. She stated that based on her knowledge of child development psychology, a child could not lie about a matter with which she had no experience, such as sexual molestation. The court of appeals found the admission of this testimony to have been harmful error because the pediatrician was no more qualified to assess the child's reports of molestation than a layperson. The expert's testimony was related to the question of the child's truthfulness, and "[t]he resolution of the credibility of all witnesses, including children, rests solely with the jury." *Id.* at 112, 342 S.E.2d at 340.

In his dissent, Judge Benham disagreed, arguing that the expert testimony tended to counter the common perception that children fantasize and make up stories. It, therefore, was offered "to show a phenomenon not normally within law [sic] perceptions." *Id.* at 115, 342 S.E.2d at 341.

In reversing the court of appeals' opinion, the supreme court held that the expert's opinion "that the child had been molested was one which the jurors would not ordinarily be able to draw for themselves." 256 Ga. 448, 450, 349 S.E.2d 684, 686 (1986).

47. See *infra* text accompanying notes 93-102.

48. See *infra* text accompanying notes 131-37.

49. Gregory & Johnson, *Evidence*, 34 MERCER L. REV. 163 (1982).

complex and not so easily reduced to generalization.

Reasoning that the expert had improperly testified on an ultimate factual issue and thus invaded the jury's province, the Georgia Supreme Court stated in dictum that this testimony was improperly admitted in *Allison v. State*.⁵⁰ In the trial court, the prosecution expert had testified that the alleged victim of sexual abuse fit the pattern of children suffering from child sexual abuse syndrome and, in his opinion, had been abused by her father.⁵¹ The defendant was convicted of child abuse and appealed, claiming error in the admission of this testimony. Although the supreme court reversed the conviction on other grounds, it indicated that admission of this testimony would have been reversible error if timely objection had been made.⁵² The court, commenting on a lack of clarity in *Smith*, attempted to distinguish between an "ultimate issue" and an "ultimate fact."⁵³ Defining the ultimate fact as "that which *is* or once *was*" (in this case, whether the child had been sexually abused), the court commented that "the existence *vel non* of a fact" was for the jury except when "the inference to be drawn from facts in evidence is beyond the ken of the jurors."⁵⁴ Thus, the court in *Allison* found that the expert testimony about general psychological characteristics of children who have been sexually abused was admissible, but the specific testimony that the alleged victim was abused and had been abused by her father was inadmissible.⁵⁵

The distinction made by the court is puzzling since *Allison* did not overrule the only slightly earlier decision in *State v. Butler*,⁵⁶ another case involving an expert's opinion on child sexual abuse syndrome. The *Butler* majority concluded that the expert's opinion was "one of fact, and was not inadmissible as a legal conclusion."⁵⁷ Furthermore, the court found that the conclusion was "one which the jurors would not ordinarily be able to draw for themselves."⁵⁸

50. 256 Ga. 851, 353 S.E.2d 805 (1987).

51. *Allison*, 256 Ga. at 851-52, 353 S.E.2d at 806-07.

52. *Id.* at 853, 353 S.E.2d at 808.

53. *Id.*

54. *Id.*

55. *Id.*

56. 256 Ga. 448, 349 S.E.2d 684 (1986). In fact, the dissent in *Allison* believed that the expert's testimony should have been admissible for reasons controlling the *Butler* decision. *Allison*, 256 Ga. at 854, 353 S.E.2d at 809 (Hunt, J., dissenting). See *supra* note 46.

57. *Butler*, 256 Ga. at 450, 349 S.E.2d at 686.

58. *Id.*

Perhaps a comparison of the two cases primarily indicates the flux still present in Georgia law concerning the helpfulness of testimony on a particular psychological theory. It also suggests that conclusions to be drawn by jurors, unaided or with the help of experts, will continue to be analyzed in terms of "ultimate issues" and "ultimate facts."

For the purpose of the following analysis, it is important to keep in mind several things about *Smith*. First, in that case there was a close, obvious nexus between the characteristics of the defendant and the psychological model of a woman suffering from battered woman syndrome. Second, in *Smith* the defendant—not the prosecution—offered the battered woman syndrome testimony. Use of such testimony by the prosecution may raise questions of improper character evidence or prejudice to the criminal defendant.⁵⁹ Finally, the subject matter of the expert testimony concerned violence in the home—a topic fraught with sociocultural myths and taboos that have shaped social attitudes.⁶⁰

II. *JONES v. STATE*

Despite the holding of *Smith* that an expert may testify on an ultimate issue,⁶¹ Georgia appellate courts have continued to cite *Jones v. State*,⁶² a leading case discussing the impropriety of permitting experts to "invade the province of the jury."⁶³ In *Jones*, the state contended that the defendant and another man committed rape, aggravated sodomy, and armed robbery during two residential break-ins. The offenders committed the crimes with the lights on in the houses. As a result, the victims could see their as-

59. See *infra* text accompanying notes 112-30.

60. See *infra* notes 163-64 and accompanying text.

61. 247 Ga. 612, 277 S.E.2d 678 (1981).

62. 232 Ga. 762, 208 S.E.2d 850 (1974).

63. *Jones*, 232 Ga. at 764, 208 S.E.2d at 853. Georgia cases after *Smith*, which have cited *Jones* with approval, are *Fordham v. State*, 254 Ga. 59, 59, 325 S.E.2d 755, 756 (1985) (improper to permit police officer to testify on whether anything in defendant's statements indicated legal justification of his killing the victim); *Nichols v. State*, 177 Ga. App. 689, 692, 340 S.E.2d 654, 657 (1986) (doctor not permitted to testify to conclusion of law that victim had been raped); *Mitchell v. State*, 176 Ga. App. 32, 32-33, 335 S.E.2d 150, 151 (1985) (credibility of witness making eyewitness identification as matter exclusively for jury); *Byrd v. State*, 163 Ga. App. 718, 719, 294 S.E.2d 686, 687 (1982) (properly excluding defendant's answers whether he acted in self-defense); *Spradlin v. State*, 160 Ga. App. 132, 134, 286 S.E.2d 310, 311 (1981) (witness not permitted to testify on whether the defendant acted in self-defense); *Davis v. State*, 158 Ga. App. 549, 553, 281 S.E.2d 305, 310 (1981) (upholding exclusion of testimony of a psychologist on eyewitness identification in a line-up).

sailants' faces. Also, physical evidence existed that linked the defendant to at least one of the crimes. The appellate courts upheld the trial judge's refusal to permit the defendant to call as an expert witness a psychologist, who had not talked to the victims, to testify about factors affecting eyewitness identification.⁶⁴

In holding that the trial court properly excluded the expert testimony, the supreme court adhered to the rule prohibiting a witness from testifying about the ultimate fact to be decided by the jury.⁶⁵ The court reasoned that assessment of the credibility of a witness, including credibility of eyewitness identification, was the jury's responsibility. The court stated that such expert testimony would be admissible if the attack on the witness's credibility involved allegations of "organic or mental disorders."⁶⁶ Otherwise, the court considered a layperson capable of evaluating the testimony. Eyewitness identification did not meet this criterion,⁶⁷ even though its reliability is often challenged by commentators and questioned by courts in relation to due process and assistance of counsel standards.⁶⁸

64. Reliability of eyewitness identification has been criticized as being affected by the unconscious reconstructive process of memory, by stress, by stereotyping and bias, by problems with cross-racial identification, and by the nature of the question asked the eyewitness. Although eyewitness identification is notoriously flawed, jurors probably place great weight on it, and appellate courts generally are likely to uphold exclusion of expert testimony on its unreliability. *See generally* E. LOFTUS, EYEWITNESS TESTIMONY (1979); A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979); Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721 (1985).

65. *Jones*, 232 Ga. at 764, 208 S.E.2d at 853.

66. *Id.* at 765, 208 S.E.2d at 853. The court listed "insanity, hallucinations, nymphomania, retrograde amnesia, and . . . physical maladies which tend to impair mental or physical faculties" as examples of these disorders. *Id.*

67. *Id.* Another basis for the court's exclusion of expert testimony was "a total lack or insufficient observation of the assaulted witness by the expert." The psychologist whose testimony was offered had not interviewed the victims. *Id.*

68. The United States Supreme Court expressed concern about eyewitness testimony:

[T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

United States v. Wade, 388 U.S. 218, 228 (1967). *Wade* and its companion case, *Gilbert v. California*, 388 U.S. 263 (1967), make clear the requirement that counsel be present at a police line-up to obviate procedural unfairness developing from prejudicial police procedures. *Wade*, 388 U.S. at 232-33. The Court recognized that unfairness may result not only from intentional police behavior, but also from psychological "dangers inherent in eyewitness identification and the suggestibility inherent in the context

The *Jones* court also expressed concern about hindering the judicial process. Once the door is open to expert testimony by a psychologist on issues of memory, "it would not be restricted to the memory, but would apply to any real or supposed deficiency in any other mental faculty."⁶⁹ Implicit in this statement may be concern not only for judicial efficiency, but also concern that expert testimony would replace the jury's common sense evaluative functions in many areas.⁷⁰

The analysis in *Jones* is important in developing a model for setting limits on the admissibility of expert testimony. The court stated that, despite broad statutory standards for admissibility of expert testimony in Georgia,⁷¹ opinion testimony was still appropriate only when it was helpful or necessary.⁷² The court also ruled that a witness may not "express on the stand an opinion of ultimate fact or the very fact to be decided by the jury because to do so would invade the province of the jury."⁷³ The juxtaposition of these two ideas of helpfulness or necessity and of the ultimate fact was important because it may have suggested that opinion testimony, including that by experts, was likely to be unhelpful or unnecessary if it dealt with an "ultimate fact." Although the supreme court's holding in *Smith* may appear to allow expert opinion on an ultimate issue,⁷⁴ Georgia courts continue to express concern over such admissibility.⁷⁵ Use of the term "ultimate fact" or "ultimate issue" may have become shorthand for a holding that the testimony is unhelpful to the jury.

Jones also illustrates a tendency of Georgia courts to exclude expert testimony on particular types of subject matter when the court believes that the jurors are likely to have experience with those topics. While the facts of *Jones* may not have presented a situation in which eyewitness identification appeared dubious,

of the pretrial identification." *Id.* at 235.

69. *Jones*, 232 Ga. at 766, 208 S.E.2d at 853.

70. The Georgia courts may feel some distrust of psychologists or psychiatrists and be reluctant to give them too much freedom in their testimony. In relation to the psychiatrist's role in insanity pleas there certainly has been retrenchment both in the legal and psychiatric communities. There also may be a historical reluctance on the part of courts to admit expert psychological testimony. See generally Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1984).

71. O.C.G.A. § 24-9-67 (1982). See *supra* note 32.

72. *Jones*, 232 Ga. at 764, 208 S.E.2d at 853.

73. *Id.*, 208 S.E.2d at 852-53.

74. *Smith*, 247 Ga. at 619, 277 S.E.2d at 683.

75. See *supra* text accompanying notes 50-55. See also W. AGNOR, *supra* note 35.

Georgia courts have cited *Jones* as precedent for a categorical bar to psychological expert testimony on the unreliability of eyewitness identification.⁷⁶ Whether such a categorical bar should continue after *Smith*, however, is questionable. *Smith* recognized the potential usefulness of psychological testimony to the jury concerning battered woman syndrome. In recognizing that experts may assist jurors in understanding this specific psychological theory, the court in *Smith* implicitly acknowledged that expert testimony may be helpful in understanding other psychological phenomena. Thus, Georgia courts might consider the usefulness of expert testimony in relation to eyewitness identification despite the holding of *Jones*.

An attempt to introduce expert testimony in a case in which the witness's identification would be considered a "collateral issue"⁷⁷ would probably still be futile. Considering the concern about the "ultimate issue" question in the *Jones* court's analysis, the probability that the more important identification is to the case, the more likely expert testimony is to be admitted, may seem ironic. Still, it seems certain that identification must be central to the case. Otherwise, the expert testimony may appear to be unnecessary, unhelpful, or distracting to the jury. *Jones*, which involved lengthy interaction between the criminals and the victims and physical evidence linking the defendant to the crime, did not present a situation in which the victims might have difficulty identifying their assailants.

A more likely situation in which expert testimony might be found appropriate would be when a defendant had an alibi,⁷⁸ therefore making the issue of identification a closer one. Importance of the identification issue would parallel the *Smith* court's careful detailing of the relationship between the defendant and victim. This comparison of similar patterns in the relationship with characteristics of battered woman syndrome⁷⁹ demonstrates the need for the expert testimony. A proponent of this evidence may be able to distinguish *Jones* as a case in which there was little difficulty about the issue of identification, and thus no need to aid the jury's judgment.

In addition, an offer of expert testimony more narrowly tailored

76. See, e.g., *Davis v. State*, 158 Ga. App. 549, 553, 281 S.E.2d 305, 310 (1981).

77. *Jones*, 232 Ga. at 766, 208 S.E.2d at 853.

78. See, e.g., *People v. McDonald*, 37 Cal. 3d 351, 360, 690 P.2d 709, 714, 208 Cal. Rptr. 236, 241 (1984); *State v. Chapple*, 135 Ariz. 281, 285, 660 P.2d 1208, 1212 (1983).

79. *Smith*, 247 Ga. at 613, 277 S.E.2d at 679.

to a specific problem about eyewitness identification might fare better with the courts than the generalized offer in *Jones*.⁸⁰ A more narrowly tailored offer also might better meet the *Smith* court's apparent requirement that the expert's testimony be related to an area "shrouded in the mystery of professional skill or knowledge."⁸¹ This testimony would not simply state that people forget or make mistakes about identification, but would address areas of scientific research with which the layperson is unfamiliar.

An example of this more defined approach is illustrated by *State v. Chapple*,⁸² an Arizona case in which the court stated in dictum that expert testimony should not be admitted "in the great majority of cases"⁸³ involving eyewitness identification. The court nevertheless found it proper to admit the testimony on narrow questions of the lack of uniformity of the "forgetting curve" related to the length of time after perception and the rate of memory loss, erroneous ideas about the effect of stress on perception, the effect of "assimilation of post-event information" on memory, the "feedback factor" in which later discussion of the event shapes the memory of it, and the counter-intuitive finding that positiveness of identification is not correlated with accuracy of identification.⁸⁴ Some of these aspects of eyewitness identification may be included in Judge Benham's classification of the "phenomenal" in his analysis of *Smith*, as areas in which common sense unaided by science may lead to "gross misconceptions."⁸⁵

An offer of specific scientific research also is likely to overcome objections that eyewitness identification is an "ultimate issue." If the bar to expert testimony on an "ultimate issue" has survived *Smith*, primarily in the sense of excluding testimony unnecessary or unhelpful to the jury,⁸⁶ then testimony about specific, generally unknown scientific findings should escape objection. Research on

80. The defense in *Jones* offered testimony on "hypothetical questions as to whether a positive identification could have been made by the victims under the circumstances of the crimes." *Jones*, 232 Ga. at 764, 208 S.E.2d at 852.

81. *Smith*, 247 Ga. at 616, 277 S.E.2d at 681.

82. 135 Ariz. 281, 660 P.2d 1208 (1983). *Chapple* was a murder case in which the conviction rested entirely on eyewitness identification and in which the witnesses might have been affected by tension and fear at the time they confronted the murderer, were under the influence of drugs, and identified the defendant some time after viewing a possibly suggestive initial photographic line-up.

83. *Chapple*, 135 Ariz. at 293, 660 P.2d at 1220.

84. *Id.* at 293-94, 660 P.2d at 1220-21.

85. *Butler v. State*, 178 Ga. App. 110, 115, 342 S.E.2d 338, 342 (1986) (Benham, J., dissenting). See *supra* notes 45-46 and accompanying text.

86. See *supra* text accompanying notes 71-75.

theories such as those detailed in *Chapple*⁸⁷ is not generally known and therefore, is arguably not redundant or unnecessary.

Finally, the offer of testimony limited to relatively narrow theories in a case in which identification is crucial should allay fears, such as those expressed in *Jones*, that allowing this testimony would open the door too wide for admission of expert psychological testimony. Admitting testimony on these narrow grounds would not be equivalent to providing precedent for psychological testimony on "any real or supposed deficiency in any . . . mental faculty" of a witness.⁸⁸

9

III. THE SCOPE OF *SMITH* AS PRECEDENT

The progeny of *Smith* and *Jones* continue to coexist in Georgia. The courts have not attempted to define exact tests or parameters for admission of psychological expert testimony, but instead have used vague descriptive terms such as "mysterious" or "complex" to help determine whether the testimony should be admitted. The courts' use of *Smith* as precedent suggests some trends in the courts' viewpoints on general fairness, procedural standards, and the appropriate subject matter of psychological expert testimony. Important related, though unspoken, concerns of Georgia courts may include some distrust of psychological theories, resulting in an effort to limit the use of this testimony.

A. *Factual Foundation/Relevance*

In determining whether psychological expert testimony should be admitted, Georgia courts first consider a threshold question of the relevance of the psychological theory. They have been reluctant to admit psychological expert testimony if it is unclear that the theory on which expert testimony is offered is specifically applicable to the facts of the case—even from a lay perspective.⁸⁹ This threshold requirement probably is a sensible check on testimony that might be confusing or misleading to the jury or that might not directly address the issues of a particular case. This practice, however, presents the dilemma of how a judge, who is not a psychologist, can determine what the limits on admissibility should be for this testimony. If the expert is testifying about a

87. *Chapple*, 135 Ariz. at 293-94, 660 P.2d at 1220-21.

88. *Jones v. State*, 232 Ga. 762, 766, 208 S.E.2d 850, 853 (1974).

89. See *infra* text accompanying notes 109-11.

mysterious⁹⁰ or phenomenal area,⁹¹ it may be difficult for a person unfamiliar with the area to determine whether the particular testimony is relevant.

This admissibility question may present even greater problems when a court attempts to limit the scope of the expert testimony,⁹² rather than when it makes an initial determination to admit the expert testimony. This determination of the proper scope of the proffered testimony may be more difficult than the determination whether a psychological theory is relevant to the facts in a particular case.

For example, in *Mullis v. State*,⁹³ the jury heard two versions of what happened when the defendant killed her husband. According to one version, the defendant wife claimed she was repeatedly beaten by her husband. She also claimed that he attacked her and threatened to kill her, and in the ensuing struggle they both fell and she accidentally stabbed him with a knife she was using in the kitchen.⁹⁴ On the other hand, the prosecution claimed that the defendant was a violent, aggressive person who previously had threatened her husband with a knife, saying she would "cut his guts out," that she was drunk when the homicide occurred, and that the killing had occurred when her husband restrained her after she tried to attack a person suffering from muscular dystrophy.⁹⁵ The state's version of the defendant's behavior was inconsistent with the passive nature of a battered woman who is a victim of "learned helplessness."⁹⁶

Under these circumstances, the trial court excluded expert testimony on battered woman syndrome, and the Georgia Supreme Court held that it was not error to exclude expert testimony which was offered to help the jury understand the reasonableness of the defendant's fear.⁹⁷ This issue of the reasonableness of the defendant's fear was identical to the issue in *Smith*, in which the same court held it was error to exclude battered woman syndrome testimony.⁹⁸ A commentator suggested that this apparent inconsistency

90. *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 9, 5 S.E.2d 219, 221 (1939).

91. *Butler v. State*, 178 Ga. App. 110, 115, 342 S.E.2d 338, 341 (1986) (Benham, J., dissenting).

92. See *infra* text accompanying notes 131-41.

93. 248 Ga. 338, 282 S.E.2d 334 (1981).

94. *Mullis*, 248 Ga. at 338, 282 S.E.2d at 336-37.

95. *Id.* at 338, 282 S.E.2d at 337.

96. See L. WALKER, *THE BATTERED WOMAN SYNDROME* 86 (1984).

97. *Mullis*, 248 Ga. at 339, 282 S.E.2d at 337.

98. *Smith*, 247 Ga. at 619, 277 S.E.2d at 683.

may have resulted because the defense in *Mullis* failed to make a threshold showing of the reasonableness of applying the characteristics of battered woman syndrome to the defendant.⁹⁹

Finding that testimony on battered woman syndrome was irrelevant, in *Pruitt v. State*¹⁰⁰ the court concluded that expert testimony was improperly admitted in the trial court. In *Pruitt*, a battery case in which the complainant was the former girlfriend of the male defendant, the prosecution, relying on *Smith*, sought to introduce expert testimony on battered woman syndrome. Three witnesses saw the fight that resulted in the battery charges; therefore, it was not difficult for the prosecution to establish that the battery had occurred. Furthermore, no factual evidence existed to show that the girlfriend was a battered woman.¹⁰¹ Consequently, it is difficult to understand how the prosecution could properly use the testimony on battered woman syndrome. The Georgia Court of Appeals agreed with the defendant that it was error to introduce this evidence when there was no convincing evidence that the girlfriend was a battered woman, but found that its introduction was harmless error.¹⁰²

Similarly, in *O'Neal v. State*,¹⁰³ the court did not permit expert testimony by a psychologist on Isolated Explosive Disorder¹⁰⁴ be-

99. Gregory & Johnson, *supra* note 49, at 164 n.11.

Similar grounds may have influenced the court's finding no error in failure to admit the expert testimony on battered woman syndrome in *Clenney v. State*, 256 Ga. 116, 344 S.E.2d 216 (1986). In that case, the defendant claimed that she had been beaten by her boyfriend, but there also was evidence to conclude that she was the aggressor in the attack that led to her boyfriend's death since, on one view of the evidence, she chased him 50 yards to a car before shooting him. For a further discussion of *Clenney*, see text accompanying notes 131-41.

Other jurisdictions also have been cautious in cases in which it is unclear whether the woman was a victim of battered woman syndrome either because a history of battering had not been established or because the homicide was too remote from any abuse by the man. See, e.g., *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981) (wife shot husband after going armed to the motel where he was living); *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (despite history of physical abuse, wife not found to be a battered woman).

100. 164 Ga. App. 247, 296 S.E.2d 795 (1982).

101. *Pruitt*, 164 Ga. App. at 249, 296 S.E.2d at 797.

102. In rejecting the appropriateness of *Smith* as precedent, the court concluded: "The facts of the instant case are distinguishable as there is no woman defendant asserting the defense of self-defense . . ." The court found, however, that admission of this testimony was harmless error. *Id.*

103. 254 Ga. 1, 235 S.E.2d 759 (1985).

104. Isolated Explosive Disorder is characterized by a single failure to resist an impulse leading to a single violent act directed at others with the "degree of aggressivity expressed" being "grossly out of proportion to any precipitating psychosocial stressor" and no underlying schizophrenia, antisocial personality disorder, or conduct disorder.

cause there was no diagnosis that the defendant suffered from this disorder.¹⁰⁵ In *O'Neal*, the defendant shot a man during a dispute over a thirty-dollar debt. After pursuing the victim through a backyard, shooting him twice and reloading the gun, the defendant fired the final, fatal shot at close range while the victim crawled before him on the ground.¹⁰⁶ The defendant wanted to introduce a general description of Isolated Explosive Disorder through the expert testimony of a psychiatrist so the jurors could assess whether the defendant fit this pattern when he acted violently. The expert, however, had not personally examined the defendant and stated that it would require many hours of tests to diagnose the disorder. Therefore, he stated that he could not give an opinion whether the defendant suffered from the disorder. Consequently, the court held that a general description of the disorder would be useless to the jury since only an intensive examination could lead to accurate diagnosis of the defendant, and the jurors could not draw a conclusion without an expert opinion.¹⁰⁷ This situation is different from the cases involving battered woman syndrome, in which the theoretical testimony of the expert was still subject to assessment by the court and jury. Rather, it is another variety of case in which a lack of factual basis precluded expert testimony.¹⁰⁸

One of the main obstacles to extending *Smith* is the Georgia courts' threshold assessment of the factual relevance of the psychological theory about which the expert will testify. In determining

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297-98 (3d ed. 1980). The 1987 revision of the *Diagnostic and Statistical Manual* eliminates Isolated Explosive Disorder as a separate category, subsuming it under "Adjustment Disorders Not Otherwise Specified." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 331 (3d rev. ed. 1987).

105. *O'Neal*, 254 Ga. at 3, 325 S.E.2d at 761.

106. *Id.* at 2, 325 S.E.2d at 760.

107. *Id.* at 3, 325 S.E.2d at 761.

108. This distinction may present a difficult situation for the proponent of such testimony in determining the scope of expert testimony to offer. On the one hand, an expert opinion may take away a determination that should be left to the jury, and the jury may give undue weight to the testimony. See *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973). Commentators have suggested that an educational function may be the most useful one for the psychologist who testifies on battered woman syndrome. Therefore, the expert testimony need not entail expert opinion, thus lessening any prejudicial impact of the expert's testimony on the jury. See, e.g., Comment, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony*, 35 VAND. L. REV. 741 (1982).

On the other hand, in *O'Neal*, without an opinion by the expert, the probative value of the general information that the defendant sought to offer was considered limited.

the legal sufficiency of the offered testimony, the appellate courts, in effect, have concluded that the trial court should first determine whether a particular defendant is a battered woman (or victim of some other psychological disorder) before allowing expert testimony on the syndrome. This stance creates an interesting tension because of the requirement that the subject matter of the expert's testimony must be beyond the ken of nonpsychologists to be helpful as expert testimony. In a specialized area, it might appear that only other experts could comment on the application of the theory to a particular set of facts. Requiring a threshold determination may prevent the time-consuming, often confusing battle of the experts, but it raises the question whether nonexperts can determine the scope of expert testimony that should be admitted.

However, this type of threshold check, based on whether the psychological theory is relevant, should be continued because it demonstrates sound policy. Ultimately, it is the attorneys, court, and jury that must be able to use the expert's information and opinions. As with all testimony, the court must initially determine what testimony is relevant and procedurally fair and decide reasonable limits for any testimony, whether expert or not.¹⁰⁹ A commentator pointed out that attorneys—and not the experts themselves—offer the testimony in a court case:

One is given the impression that psychiatrists have forced their way into the courtroom, displaying and selling opinions like so many pots and pans, and in so doing, have irredeemably compromised the search for justice.

.
It is ironic that whenever public attention is directed to the supposed deficiencies of psychiatric testimony, the criticism is trained on the experts rather than on the lawyers or the courts.¹¹⁰

Because the relevance of the testimony is determined by the court's standards, it is sensible and proper to test it by common sense standards and current legal standards.¹¹¹

109. The court makes the initial assessment under Georgia's very broad statutory standard of relevance: "Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matters should be excluded." O.C.G.A. § 24-21-1 (1982). *See also* W. AGNOR, *supra* note 35, § 10-1.

110. Bonnie, *supra* note 70, at 5.

111. This confinement of the courts to their own standards also may underlie the reluctance of Georgia courts to go into detailed assessment of the validity or reliability of a psychological theory. *See infra* notes 147-60 and accompanying text.

The initial determination that a theory is relevant to a particular case also promotes good policy because the jurors must understand the relevance of the theory before it can be helpful to them. If the proponent of a psychological theory cannot initially demonstrate the relevance of the theory, juror confusion will likely result from the testimony.

B. *Procedural Standards*

This same dilemma concerning expert testimony—that, logically, because of the complexity of particular areas, it might appear that only experts could set standards about the applicability and extent of their testimony and yet that courts must apply their own nonexpert standards—also may arise in relation to standards of procedural fairness for the admissibility of this testimony. In some cases, the courts have followed the general legal standards for exclusion of improper character evidence or prejudicial evidence.¹¹² A more problematic situation occurs when the court tries to limit the scope of the expert testimony.

Georgia courts have exercised special care in criminal cases when the prosecution, rather than the defense, has attempted to introduce expert testimony on a psychological syndrome.¹¹³ Suggestions that a defendant exhibits a syndrome, or even mere description of the syndrome by a prosecution expert, has been viewed as tantamount to introduction of character evidence and usable only in the limited circumstances in which character evidence may be introduced.¹¹⁴

For example, in *Sanders v. State*¹¹⁵ the prosecution sought to introduce expert testimony that the defendant, who was accused of murdering her infant daughter, fit the profile of battering parent syndrome.¹¹⁶ The court held that:

[U]nless a defendant has placed her character in issue or has raised some defense which the battering parent syndrome is relevant to rebut, the state may not introduce evidence of the syndrome, nor may the state introduce character evidence showing a defendant's personality traits and personal history as its foundation for demonstrating the defendant has the

112. See, e.g., *Sanders v. State*, 251 Ga. 70, 76, 303 S.E.2d 13, 18 (1983).

113. See *infra* text accompanying notes 115-30.

114. O.C.G.A. § 24-2-2 (1982) (general character of parties usually irrelevant).

115. 251 Ga. 70, 303 S.E.2d 13 (1983).

116. See *supra* note 5.

characteristics of a typical battering parent.¹¹⁷

Courts are reluctant to permit testimony about a psychological syndrome introduced to prove that the crime occurred, even if it is introduced in rebuttal. In *Allison v. State*,¹¹⁸ the prosecution introduced expert testimony on child sexual abuse syndrome,¹¹⁹ claiming that the testimony was relevant to rebut a defense.¹²⁰ The defendant claimed that he had not sexually abused his daughter, and that the child had fabricated a story of sexual abuse at the instigation of the defendant's ex-wife.¹²¹

To rebut the defendant's denial, the prosecution introduced expert testimony tending to show that the daughter had the characteristics typical of a sexually abused child. Specifically, the characteristics identified as typical of child sexual abuse syndrome were: (1) secrecy about the abuse; (2) the child feeling helpless to do anything to prevent the abuse; (3) the child accommodating the abuse by pretending that the abuse is not taking place; (4) "delayed, conflicting and unconvincing disclosure (the child may at first give information that makes no sense or may be unconvincing)"; and (5) recantation.¹²² The last two characteristics were particularly important because of contradictions in the child's account of events. In one interview, the child stated that physical contact with the father had been both accidental and intentional.¹²³ The prosecution claimed that the expert testimony would help the jurors understand the confusion in the child's testimony in light of the characteristics of a child suffering from child sexual abuse syndrome.¹²⁴

The supreme court disagreed with the court of appeals' conclusion that the testimony was useful to the jurors, similar to the expert testimony in *Smith*.¹²⁵ The supreme court's finding of error, however, rested on the impropriety of the prosecution calling its expert witnesses without furnishing the names of the witnesses to the defendant upon pretrial request.¹²⁶ The court rejected claims

117. *Sanders*, 251 Ga. at 76, 303 S.E.2d at 18.

118. 256 Ga. 851, 353 S.E.2d 805 (1987).

119. See *supra* note 6.

120. *Allison*, 256 Ga. at 854, 353 S.E.2d at 808.

121. *Allison*, 179 Ga. App. 303, 304, 346 S.E.2d 380, 382 (1986), *rev'd*, 256 Ga. 851, 353 S.E.2d 805 (1987).

122. *Id.* at 305, 346 S.E.2d at 382.

123. *Id.* at 304, 346 S.E.2d at 382.

124. *Id.* at 304-05, 346 S.E.2d at 382.

125. *Allison*, 256 Ga. at 853, 353 S.E.2d at 808 (dictum).

126. *Id.* at 853-54, 353 S.E.2d at 808. O.C.G.A. § 17-7-110 (Supp. 1987) requires that

that the state introduced the expert witnesses only in rebuttal to the defense that the child had not been molested. "[I]t is apparent that the state anticipated the defendant's testimony in this regard, and that the witnesses were an important part of the state's main case, rather than true rebuttal witnesses."¹²⁷

It therefore appears that it may be more problematic for the prosecution to use psychological expert testimony tending to establish that a crime has been committed than for the defendant to use this testimony to establish a defense. In *Allison*, the supreme court's decision turned on concern for procedural fairness, not just on the court's concern with limiting expert testimony. Judge Carley's special concurrence in the court of appeals' opinion explained the rationale for this concern:

I am fearful of placing the judicial stamp of approval upon prosecutorial sandbagging by calling this testimony "rebuttal." The majority's rationale would allow the State to bring in such high-powered "rebuttal" defense in almost any case unless the defendant offered no defense. I say this because, in any case in which a defendant denies the essential elements of the crime, the State can contend that the defendant had in effect "attacked" the credibility of the State's witnesses.¹²⁸

Although the court of appeals had merely limited use of the expert testimony under the *Sanders* standard, which prohibits the prosecution from using it as an "affirmative weapon,"¹²⁹ the supreme court's decision suggested situations in which the courts might deem that the prosecution was attempting to use the testimony as an "affirmative weapon."¹³⁰

In contrast to complete exclusion of expert testimony on a psychological theory, the court of appeals in *Clenney v. State*¹³¹ limited the scope of expert testimony on battered woman syndrome.

a criminal defendant be provided with the names of prosecution witnesses.

127. *Allison*, 256 Ga. at 854, 353 S.E.2d at 808.

128. *Allison*, 179 Ga. App. at 311, 346 S.E.2d at 386 (Carley, J., concurring specially).

129. *Id.* at 308, 343 S.E.2d at 385.

130. *Allison*, 256 Ga. at 853-54, 353 S.E.2d at 808. The court noted that the prosecution did not call the experts during its case in chief and failed to provide their names to the defendant even though he had filed a timely demand for the list.

Although it might appear that the prosecution could always anticipate a denial or attack on the credibility of prosecution witnesses, it should be noted that in *Allison* the prosecution had special reason to anticipate the defense since it had been used in a previous trial which ended in mistrial. *Allison*, 179 Ga. App. at 308, 346 S.E.2d at 385.

131. 256 Ga. 116, 344 S.E.2d 216 (1986).

In *Clenney*, the defendant testified that the deceased began beating her several weeks before she shot him and that, on the day of the shooting, he had tried to lure her into a river to drown her.¹³² The trial court admitted expert evidence about battered woman syndrome relating to the defendant's recent, relatively short-term relationship with the victim, but refused to admit testimony indicating that she suffered from the syndrome because of twenty-eight years of abuse in two previous relationships.¹³³ The Georgia Court of Appeals upheld the exclusion partially because the expert testimony was offered to explain the defendant's state of mind and lack of remorse after the homicide, and thus was not used, as in *Smith*, to explain the reasonableness of the defendant's fear in defending herself.¹³⁴ To support its conclusion, the court referred to the statutory standards for self-defense in Georgia, which require that justification be based on events happening between the defendant and victim.¹³⁵

Of particular importance in *Clenney*, however, was the court's assessment that "[i]t would be difficult, if not impossible, for the state to rebut, refute or test as to credibility, evidence of abuse by third parties."¹³⁶ Evidently, the *Clenney* court was concerned with the difficulty of establishing the factual basis of battered woman syndrome with respect to the earlier relationships. Yet the court had determined it was relevant that the defendant allegedly suffered from battered woman syndrome.¹³⁷ Possibly, it was concerned about the prejudicial effect of presenting the defendant as a suffering woman, which might cause the jury to arrive at an acquittal not based on legal standards, but upon emotional reactions.¹³⁸

However, it is difficult to understand a principled reason for the

132. *Clenney*, 256 Ga. at 116, 344 S.E.2d at 217.

133. *Id.* at 118, 344 S.E.2d at 218.

134. *Id.*

135. *Id.* (citing O.C.G.A. § 24-2-1 (1982)). See also O.C.G.A. § 16-3-21 (1982).

136. *Clenney*, 256 Ga. at 118, 344 S.E.2d at 218.

137. *Id.* (implicit in allowing testimony on battered woman syndrome is the court's finding of relevance).

138. A similar criticism of the prejudicial potential effect of expert testimony about battered woman syndrome relates to the emotional impact of showing the defendant as victimized by the deceased. Several commentators opposed to the admissibility of expert testimony on battered woman syndrome base their opposition on the grounds that it goes outside established legal standards for self-defense. They quote Percy Foreman, a leading criminal defense attorney, who said, "The best defense in a murder case is the fact that the deceased should have been killed regardless of how it happened." Acker & Toth, *Battered Women, Straw Men, and Expert Testimony: A Comment on State v. Kelly*, 21 CRIM. L. BULL. 125, 147 (1985).

court to limit the scope of the testimony. If a woman suffers from a psychological condition affecting her judgment of the reasonableness of fear, it seems minimally important whether that syndrome developed solely because of her relationship with the victim or from her relationship with other men as well. Once a court accepts that testimony about a syndrome is relevant, a degree of deference to the psychological expert's knowledge concerning which facts are relevant to developing the syndrome may be appropriate. If a court has doubts about the probative value of the psychological theory, it could provide greater guidance by establishing an explicit balancing of probative value versus prejudice, although such explicit balancing is not generally accepted procedurally by Georgia courts.¹³⁹

The dissent in *Clenney* suggested that "[t]he question is whether or not the syndrome is present" in determining whether evidence about previous abusive relationships should be admissible.¹⁴⁰ The dissent also suggested that the court could exclude evidence of the syndrome if the testimony became unduly burdensome or repetitious. This approach would make balancing a more explicit process and would focus the attention of the court and jury more clearly on the effect of the syndrome instead of on the formative facts associated with it. In contrast, the majority's approach was concerned with the attendant facts and with the possible unfairness of admitting them into evidence.¹⁴¹

C. Subject Matter of Testimony

Georgia courts also have expressed concern about the subject matter on which expert psychological testimony is deemed to be helpful or necessary. Explicitly, the courts have described this as an area that is mysterious, complex, or phenomenal.¹⁴² Unfortunately, these adjectives are of little help in predicting the type of case in which a court will extend the *Smith* precedent. The appropriate subject matter for expert testimony generally is either a topic about which the ordinary juror has no knowledge or experi-

139. Professor Agnor has pointed out that Georgia courts favor the admissibility of all relevant evidence, even evidence of slight probative value, and has assessed a Georgia judge's discretion to exclude relevant evidence, when weighed against such factors as prejudice, confusion, or surprise, as existing more in theory than in practice. W. AGNOR, *supra* note 35, at § 10-2. Consequently, it may be unlikely that a Georgia court would engage in explicit balancing.

140. *Clenney*, 256 Ga. at 120, 344 S.E.2d at 220 (Gregory, J., dissenting).

141. *Id.* at 118, 344 S.E.2d at 218.

142. See *supra* text accompanying notes 42-46.

ence or one about which the expert's testimony would lead the juror to a different conclusion than he or she would reach unaided by the testimony.¹⁴³ The first area, expert testimony concerning medical or scientific principles not generally within a juror's knowledge, is probably the simpler area to understand.¹⁴⁴ In this first area, the expert offers information and opinions on subjects about which laypeople lack specialized knowledge. Therefore, the relevance and usefulness of the testimony is more immediately apparent to the court and jury.

The second area, testimony that would lead jurors to a result different than the one they would reach without the testimony, is more difficult to assess. Psychologists do not possess a unitary view of human behavior.¹⁴⁵ Furthermore, psychologists deal with human behavior—an area in which every juror has experience and opinions. In fact, the whole jury system is founded upon faith in the common sense opinions of ordinary jurors. In assessing the admissibility of expert testimony in these circumstances, the court makes a threshold determination of areas in which ordinary opinion, common knowledge, and conventional wisdom are likely to lead the jurors astray or result in confusion.¹⁴⁶

Generally, Georgia courts have not expressed doubts about a particular psychological theory in cases in which the parties offer expert psychological testimony. In fact, the *Smith* court accepted battered woman syndrome with no discussion of the newness or possible unreliability of the theory.¹⁴⁷ The court discussed the syndrome's acceptance in other jurisdictions¹⁴⁸ and compared battered woman syndrome to battered child syndrome, suggesting, almost without comment, that Georgia courts had accepted the latter theory.¹⁴⁹

The validity of child sexual abuse syndrome, however, has received closer attention.¹⁵⁰ In *Allison*, the Georgia Supreme Court

143. See *supra* text accompanying notes 36-37.

144. See *supra* note 32.

145. May, *Foreword* to 1 *ENCYCLOPEDIA OF PSYCHOLOGY* at xix (R. Corsini ed. 1984).

146. See *supra* text accompanying notes 89-111.

147. *Smith*, 247 Ga. at 612, 277 S.E.2d at 678. But see *Sanders v. State*, 251 Ga. 70, 74 n.4, 303 S.E.2d 13, 17 n.4.

148. *Smith*, 247 Ga. at 617-19, 277 S.E.2d at 682-83.

149. *Id.* at 617, 277 S.E.2d at 682.

150. It should be noted that child sexual abuse syndrome is not uniformly accepted as a diagnostic tool. Many of the symptoms may occur after any stressful occurrence in a child's life, not just after sexual abuse. See Comment, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 *Geo. L.J.* 429 (1985).

stated that expert testimony on the theory was proper under O.C.G.A. § 24-9-67.¹⁵¹ It did not, however, review the theory under the rule of *Harper v. State*¹⁵² for admissibility of a novel scientific theory, holding that lack of objection at the time of trial constituted waiver of the issue.¹⁵³

The court of appeals had found that child sexual abuse syndrome satisfied the *Harper* standard that "it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty . . ."¹⁵⁴ This holding modified the requirement that the theory be generally accepted in the scientific community. This earlier general rule originated in *Frye v. United States*,¹⁵⁵ a case that has greatly influenced many courts and has also been much criticized.¹⁵⁶ Instead, the court in *Harper* emphasized the importance of the trial court making its own determination of the "verifiable certainty" of the scientific evidence,¹⁵⁷ but it also explained that the trial court may properly take judicial notice of findings in other jurisdictions on the issue of admissibility of the particular type of evidence.¹⁵⁸ This conclusion accords with the Georgia courts' tendency generally to describe the holdings of other jurisdictions on a particular psychological theory without making an independent assessment of the theory.

This approach is not surprising in a jurisdiction that emphasizes the common sense threshold and general evaluation of a theory.¹⁵⁹ Reliance on the scientific community's opinion might seem more appropriate if evidence is offered on a scientific instrument, machine, or technique based on physics, biology, or chemistry, such as

151. 256 Ga. at 852, 353 S.E.2d at 807 (citing O.C.G.A. § 24-9-67 (1982)). The Code provides that "opinions of experts on any question of science, skill, trade, or like questions shall always be admissible" O.C.G.A. § 24-9-67 (1982).

152. 249 Ga. 519, 292 S.E.2d 389 (1982) (use of truth serum).

153. *Allison*, 256 Ga. at 852, 353 S.E.2d at 807.

154. *Allison v. State*, 179 Ga. App. 303, 308, 346 S.E.2d 380, 384 (1986) (citing *Harper*, 249 Ga. at 525, 292 S.E.2d at 395).

155. 293 F. 1013, 1014 (D.C. Cir. 1923).

156. The Georgia courts appear to be more in line with those jurisdictions which treat expert testimony on scientific topics as a matter of general relevancy. This approach also is closer to that taken by Rule 702 of the Federal Rules of Evidence, although it is not clear what effect the introduction of the Federal Rules has had on the *Frye* standard. See Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1228 (1980).

157. *Harper*, 249 Ga. at 525, 292 S.E.2d at 395.

158. *Id.* at 526, 292 S.E.2d at 396.

159. See *supra* text accompanying notes 89-91.

use of a truth serum or the polygraph.¹⁶⁰ In contrast, it is more difficult to verify information about human behavior. Therefore, the human behavior standard should be different from the standard used in the natural science area.

In fact, commentators who support using psychological expert testimony have argued that its admission into evidence may be appropriate because it encompasses common lay experience.¹⁶¹ For example, jurors may actively evaluate expert testimony on battered woman syndrome because of the common experience involved. Though jurors may not have actually experienced battering relationships, most do have some experience with at least observing domestic strife.¹⁶²

Yet, familiarity with these experiences does not mean that presentation of these theories is not necessary or helpful to the juror. In the case of battered woman syndrome, the juror hears testimony that the woman stayed in a relationship in which she sustained beatings and lived in fear for her life. Common sense explanations for her testimony might include that she had a perverse fondness for the experience, that she was lying, or that the situation really was not so bad because she stayed with the batterer. In addition, even the juror who has experienced domestic violence may be affected by the myth of the home as a safe, tranquil setting,¹⁶³ and such a myth may influence his or her evaluation of the situation.¹⁶⁴ The psychologist assists the jury by providing theoretical constructs, such as "learned helplessness"¹⁶⁵ or the self-perpetuating cyclical nature of battering relationships to explain this seemingly odd behavior.¹⁶⁶ The jury then can decide whether the psychologist's explanation works as well, better, or not as well as the jurors' own common sense theories.

This view of the process also should effectively counter any lingering fears that the expert is invading the province of the jury by

160. See, e.g., *State v. Chambers*, 240 Ga. 76, 239 S.E.2d 324 (1977) (concerning reliability of the polygraph).

161. See *supra* note 108.

162. See Blackman & Brickman, *The Impact of Expert Testimony on Trials of Battered Women Who Kill Their Husbands*, 2 BEHAVIORAL SCI. & L. 413, 414 (1984).

163. R. GELLES & C. CORNELL, *INTIMATE VIOLENCE IN FAMILIES* 122 (1985).

164. M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 22-23 (1980). It is likely that the myth of the tranquil home helped to perpetuate judicial hesitancy to interfere with domestic violence. See generally Marcus, *supra* note 15.

165. See L. WALKER, *THE BATTERED WOMAN SYNDROME* 86-87 (1984).

166. See Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 Vt. L. Rev. 1 (1982).

dealing with an ultimate issue. The expert instead provides information that is unfamiliar to the jury.¹⁶⁷ The witness also may provide an opinion, which the jury may consider along with other evidence.

Similar to cases involving battered woman syndrome, a case like *Allison*, which involved an adult defendant's denial of sexual abuse and a child with a confused story of possible sexual abuse, presents a situation that is difficult to assess using only common sense. What weight should the juror give the child's inconsistent story? The first reaction—the common sense one—may be to discount the story. The juror also may have an idealized myth of a safe, harmonious home and a healthy, loving parent-child relationship, which affects his or her evaluation of the child's testimony. In this instance, the expert on child sexual abuse syndrome can offer a rationale that may help the juror understand an unfamiliar, puzzling experience.¹⁶⁸

In some cases in which Georgia courts did not follow *Smith*, the question of the helpfulness of testimony on a particular subject matter did not arise. For example, the court apparently did not reach this issue in relation to battering parent syndrome¹⁶⁹ and Isolated Explosive Disorder.¹⁷⁰ Expert testimony was limited in these cases because of concerns of procedural fairness to the defendant.

In other cases, however, Georgia courts found that *Smith* was inapposite because expert testimony on a particular subject would not be necessary or helpful to the jury. For example, in *Williams v. State*¹⁷¹ the court concluded that the expert provided no information or opinion beyond the jury's understanding. Although *Wil-*

167. Because it is difficult to believe that the average modern juror is completely unaware of domestic violence or really believes that the family is always a safe haven for the individual, it has been questioned whether myths and misconceptions actually exist about domestic violence. Acker & Toth, *supra* note 138, at 138-40.

168. Although testimony on child abuse syndrome involves medical rather than psychological testimony, it is admissible in a similar way. The expert testifies not just to specific injuries, as in a personal injury case, but to the inference that certain combinations and severity of injuries do not ordinarily occur except when a child is abused. This testimony may give the juror useful information when the adult, often the parent or guardian, denies abusive treatment.

169. *Sanders v. State*, 251 Ga. 70, 303 S.E.2d 13 (1983).

170. *O'Neal v. State*, 254 Ga. 1, 325 S.E.2d 759 (1985). In *O'Neal*, the court was explicit about not reaching the issue: "We intimate no opinion about whether the alleged malady, [i.e., Isolated Explosive Disorder] would satisfy our legal tests of insanity." *Id.* at 3, 325 S.E.2d at 761.

171. 254 Ga. 508, 330 S.E.2d 353 (1985).

liams did not involve a psychological theory, it provides an example of a case in which the expert offered only a common sense conclusion.

In *Williams* the defendant claimed that the man whom he had shot had fired first. A police officer, however, testified as an expert about factors that indicated the homicide scene had been staged to make it appear that the victim shot first. For example, a chair leg was over the victim's pants cuff, and the officer testified to the conclusion that " 'the victim was unable to move this chair over his pants legs after he was shot.' " ¹⁷² The court found the expert testimony unnecessary since the jurors could assess the crime scene as well as the expert. ¹⁷³ In reaching this conclusion, the court stated that this was not a "complex" area such as the battered woman syndrome at issue in *Smith*. ¹⁷⁴

The assessment that a crime expert's opinion is unnecessary to determine the sequence of events at the crime scene was extended to a more complicated situation in *Coleman v. State*, ¹⁷⁵ in which patterns of bullet slugs, blood stains, and furnishings were used by an expert to reconstruct the sequence of events in a shooting and knifing incident. Even though the court of appeals found that, without the expert's testimony, "the jury would have been faced with translating seemingly meaningless facts into possibly erroneous conclusions, or ignoring the physical evidence altogether," ¹⁷⁶ the supreme court severely limited the use of the expert testimony. ¹⁷⁷ It held that the expert could testify only whether the physical evidence was consistent with a hypothetical situation, reasoning that conclusions about the crime scene "were not beyond the ken of the jurors, once they were apprised of the physical evidence and the *permissible* conclusions of [the expert]." ¹⁷⁸

In contrast, the contention that the psychological factors affecting the voluntariness of a confession are not "complex" is more problematic. Yet, Georgia courts also have refused to extend the *Smith* rule to expert testimony about the voluntariness of a confes-

172. *Williams*, 254 Ga. at 510, 330 S.E.2d at 355.

173. *Id.* at 510 n.2, 330 S.E.2d at 355 n.2. The court also found it unnecessary bolstering of an opinion by use of expert testimony, comparing this use to bringing in the Pope or Einstein to testify about notice in a slip and fall case.

174. *Id.* at 511, 330 S.E.2d at 355.

175. 179 Ga. App. 834, 348 S.E.2d 70 (1986), *aff'd*, 257 Ga. 313, 357 S.E.2d 566 (1987).

176. *Coleman*, 179 Ga. App. at 836, 348 S.E.2d at 72.

177. *Coleman v. State*, 257 Ga. 313, 357 S.E.2d 566 (1987).

178. *Id.* at 314, 357 S.E.2d at 567.

sion. In *Sinns v. State*,¹⁷⁹ the defendant, after receiving *Miranda* warnings,¹⁸⁰ confessed to a murder. At a *Jackson v. Denno* hearing,¹⁸¹ the court in *Sinns* ruled that the confession was voluntary.¹⁸² At trial, however, the defendant attempted to introduce expert testimony about his state of mind when he confessed in an effort to challenge the voluntariness of the confession. The trial court, relying on the decision of the court of appeals in *Smith*, found this question was an ultimate issue that the jury should decide.¹⁸³ However, the Georgia Supreme Court, relying on its decision in *Smith*, found that the ultimate issue question did not bar expert testimony. Instead, the court determined the question was whether it should extend, to the voluntariness of a confession, the rule in *Smith* that “[e]xpert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible” if beyond the ken of ordinary jurors.¹⁸⁴ The court summarily held that “[t]he *Smith* holding was the result of the need to treat a unique and almost mysterious area of human response and behavior. The voluntariness of a confession is not a circumstance akin to the complex subject of battered wife syndrome.”¹⁸⁵

The conclusion that psychological testimony about the pressures that may produce a confession would be less useful to a jury than testimony concerning an abused woman’s reaction is difficult to understand.¹⁸⁶ It is unclear why the pressures arising during police interrogation are less “mysterious” or “complex” than the responses of a battered woman. The court provided no clear standards to explain why it did not extend the *Smith* rule to *Sinns*. Administrative concerns may have affected the court because, in a situation challenging a confession, the court’s admission of expert testimony might open this avenue of challenge to a much larger class of criminal defendants than in the case of battered woman syndrome.

179. 248 Ga. 385, 386, 283 S.E.2d 479, 480 (1981).

180. *Miranda v. Arizona*, 384 U.S. 436 (1965) (excluding evidence of inculpatory statements made by a defendant during custodial interrogation absent procedural safeguards).

181. 378 U.S. 368 (1964) (preliminary hearing in which the government must prove by a preponderance of the evidence the voluntariness of a confession).

182. *Sinns*, 248 Ga. at 385, 283 S.E.2d at 480.

183. *Id.* at 387, 283 S.E.2d at 481.

184. *Id.* (quoting *Smith*, 247 Ga. at 619, 277 S.E.2d at 683).

185. *Id.*

186. Both dissenting justices in *Sinns* suggested that the question the majority really decided was still the “ultimate issue” question. *Id.* at 387-88, 283 S.E.2d at 481-82 (Clark & Gregory, JJ., dissenting).

Furthermore, courts already have procedural standards, such as the *Miranda* procedures, to protect defendants from giving coerced confessions. Sinns' attempt to introduce expert psychological testimony after he had received full procedural safeguards may suggest that the legal system's current procedures provided the defendant with inadequate protection against conviction based on an allegedly involuntary confession. This rationale, that the legal system already has provided safeguards against an involuntary confession, is more persuasive than the court's claim that psychological factors leading to a confession are less "complex" than the characteristics of the victim of battered woman syndrome.

Georgia courts have refused to consider an extension of the *Smith* precedent to allow expert testimony about the unreliability of eyewitness testimony and have maintained the position of the court in *Jones*. For example, in *Davis v. State*,¹⁸⁷ the supreme court followed *Jones* in concluding that jurors "can readily determine for themselves whether eyewitness identification testimony is reliable."¹⁸⁸ The issue in *Davis* was the alleged suggestiveness of a police line-up. Although the court noted that the expert was unqualified on the conduct of line-ups and had not talked to the witnesses in the case, the court also apparently barred categorically expert testimony on eyewitness identification by its adherence to the *Jones* precedent.¹⁸⁹ This conclusion suggests the court's determination that the reliability of eyewitness identification is not an area in which expert testimony is needed. Similar to situations involving domestic violence and child abuse, however, psychologists have discovered that common sense determinations about eyewitness identification do not always lead to accurate assessments of perception and memory.¹⁹⁰ It is difficult, therefore, to make a principled distinction between expert testimony on battered woman syndrome or child sexual abuse syndrome and on the vagaries of eyewitness identification only on the basis of the subject matter.

As with the voluntariness of a confession, police line-ups and similar identifications are subject to procedural safeguards, which have resulted from the judicial system's recognition of problems with reliability of eyewitness identification.¹⁹¹ The notion that existing procedural safeguards already provide the defendant with

187. 158 Ga. App. 549, 281 S.E.2d 305 (1981).

188. *Davis*, 158 Ga. App. at 553, 281 S.E.2d at 310.

189. *Id.*

190. See generally *supra* note 64.

191. *United States v. Wade*, 388 U.S. 218 (1967). See *supra* note 68.

adequate protection may influence a court in determining whether the defendant also should be allowed to introduce expert testimony on these issues.

Unlike the problem with confessions, however, the question of eyewitness identification is usually concerned with the reliability of the evidence, not with the fairness of how the evidence is used. The expert can testify to factors affecting the perception and memory of the witness that may not be within the knowledge of the jurors. The rule in *Smith* provides that the expert may give an opinion when the conclusion is not one that laypeople could draw.¹⁹² In cases involving eyewitness identification, the expert provides, through his or her testimony, a perspective to the jurors about the credibility of the evidence. This perspective is separate from issues of suggestiveness or other unfair police procedures in identification. This separate issue, on which expert testimony may be helpful, should be reconsidered by Georgia courts.

Regarding the question of what subject matter is appropriate for expert testimony, Georgia courts seem particularly receptive to psychological theories that involve problems of domestic violence and child abuse, areas that only recently have received explicit recognition. Sociocultural myths about these problems are likely to affect a juror's perception. Moreover, this area is to some extent taboo, and, as a result, people generally are uncomfortable with the idea of violence being possibly "more common than love" in the family.¹⁹³ Because this myth-laden area is emotionally charged, jurors may find it difficult to assess rationally questions related to this area.

Finally, Georgia courts have opened psychological expert testimony to relatively small classes of defendants. Administrative concerns of opening floodgates may be a major unspoken criterion for refusing to allow challenges through psychological expert testimony in such areas as voluntariness of confessions and perception of and memory of witnesses.

IV. RAPE TRAUMA SYNDROME: A HYPOTHETICAL CASE

Considering these trends, it is possible that expert testimony on rape trauma syndrome may be admitted when a Georgia appellate court first addresses this issue. Rape trauma syndrome is a post-

192. *Smith*, 247 Ga. at 619, 277 S.E.2d at 683.

193. R. GELLES & C. CORNELL, *supra* note 163, at 12.

traumatic condition characteristic of a rape victim.¹⁹⁴ Testimony concerning the syndrome has been offered in some jurisdictions¹⁹⁵ in rape cases in which the defendant admitted that sexual intercourse took place, but claimed that it was consensual.¹⁹⁶ The complainant, in theory, would not exhibit the symptoms of rape trauma syndrome if she had engaged in consensual sex. Therefore, the existence of the syndrome tends to prove that the intercourse was involuntary.¹⁹⁷

For expert testimony on the syndrome to be admissible in a hypothetical Georgia case, a sound, common sense nexus must exist between the facts of the case and the expert's theory. This finding would satisfy the initial "common sense requirement" of Georgia courts that the relevance of expert testimony be readily apparent to laypeople.¹⁹⁸

Such expert testimony would be useful only in a relatively small, defined set of cases. It would not provide precedent, therefore, for the wholesale allowance of expert testimony on a wide range of issues. This narrow scope makes it more likely that Georgia appellate courts would accept testimony on the syndrome because it would not lead to the possible delay and hindrance of the judicial process feared by the *Jones* court.¹⁹⁹

It also seems likely that Georgia courts would be receptive to the subject matter of rape trauma syndrome as comparable to battered woman syndrome or to child sexual abuse syndrome. The introduction of expert testimony on rape trauma syndrome, however, may well encounter limitations to prevent the introduction of impermissible character evidence.

The subject matter of rape trauma syndrome is similar to other areas that the courts have considered "mysterious." It is an emotional area that is taboo and difficult for jurors to assess independently. In dictum, the Georgia Supreme Court indicated that this is a viewpoint with which it is sympathetic when, in *Warren v.*

194. See *supra* note 8.

195. See, e.g., *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982). *Contra State v. Saldana*, 324 N.W.2d 727 (Minn. 1982). See also Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 424-32 (1985).

196. E.g., *Marks*, 231 Kan. at 652, 647 P.2d at 1298.

197. *Id.* at 654, 647 P.2d at 1299 ("presence of rape trauma syndrome is detectable and reliable as evidence that a rape did take place . . .").

198. See *supra* text accompanying notes 109-11.

199. *Jones v. State*, 232 Ga. 762, 766, 208 S.E.2d 850, 853 (1974).

State,²⁰⁰ a case holding that there is no marital exception for the rape law, the court quoted a commentator and observed:

[T]he mention of rape makes us all uneasy—for different reasons depending on who we are. It makes men uneasiest of all perhaps, and usually brings forth an initial response of nervous laughter or guffaw-evoking jokes. After all, as far as the normal, but uninformed, man knows, rape is something he might suddenly do himself It isn't, of course, but *he knows too little about it to realize that*.

. . . .
 . . . To most women, [rape] is almost as unreal as it is to most men because they themselves have not experienced it, and *few people who have done so are in the habit of talking about it*.²⁰¹

The court described rape as an area that is unknown to the ordinary person and fraught with myth and taboo. Thus, in these characteristics, rape is similar to battered woman syndrome or child sexual abuse syndrome. It is likely, therefore, to be an acceptable area for expert testimony.

The very myth-laden, emotionally-charged nature of rape, however, may make courts especially concerned with protecting the defendant from possible unfair procedure.²⁰² Fairness to the defendant means that any prosecution attempt to introduce such testimony will be limited by the standards established in *Sanders*²⁰³ and *Allison*.²⁰⁴

Sanders prohibited the prosecution from using testimony on a psychological syndrome as an "affirmative weapon,"²⁰⁵ but left open the possibility of its use in rebuttal. It is, however, problematic to what extent such rebuttal use is available after *Allison*.

The Georgia Supreme Court's limitations in *Allison* on expert testimony concerning child sexual abuse syndrome demands considerable skill from the prosecuting attorney who attempts to in-

200. 255 Ga. 151, 336 S.E.2d 221 (1985).

201. *Warren*, 255 Ga. at 152 n.2, 336 S.E.2d at 222 n.2 (quoting Massaro, *supra* note 195, at 399 n.27) (brackets in original) (emphasis added).

202. The dissent in *State v. Butler* expressed similar concern for the accused in a case involving child sexual abuse: "We cannot allow our revulsion of sexual abuse or molestation to turn our courts into a forum in which the accusation becomes the conviction and affirmation." 256 Ga. 448, 454 n.4, 349 S.E.2d 684, 689 n.4 (1986) (Smith, J., dissenting).

203. *Sanders v. State*, 251 Ga. 70, 303 S.E.2d 13 (1983).

204. *Allison v. State*, 256 Ga. 851, 353 S.E.2d 805 (1987).

205. 251 Ga. at 75, 303 S.E.2d at 17.

troduce evidence on a syndrome tending to prove the commission of a crime and guilt of the defendant. However, the court does not prohibit expert testimony provided that it stops short of making the evaluation reserved for the jury. In *Allison*, it was objectionable for the expert to say that the child was abused. The court stated:

The jury having the benefits of extensive testimony as to the lineaments of the child abuse syndrome as well as testimony that the child exhibited several symptoms that are consistent with the syndrome, was fully capable of deciding—upon their own—whether the child *in fact* was abused, and, if so, whether Allison did it.²⁰⁶

Consequently, the introduction of expert testimony, whether on child sexual abuse syndrome or rape trauma syndrome, requires considerable caution and skill, but still seems to be an available option.

CONCLUSION

The Georgia practitioner interested in determining whether to introduce expert testimony on a psychological theory or interested in countering the introduction of such testimony by an opponent confronts an uncertain and developing area of Georgia law. Recent cases suggest a number of factors must be considered, including the nexus between the facts of the case and a layperson's understanding of the theory, the procedural posture of the case, and the subject matter of the expert testimony. Although the courts have cautiously limited the use of such testimony, the changing nature of the law presents opportunities for the creative use of expert testimony on novel psychological theories.

Mary Ann Ramey

206. 256 Ga. at 853, 353 S.E.2d at 808.